



December 3, 2001

Mr. Brett Bray
Director, Motor Vehicle Division
Texas Department of Transportation
P.O. Box 2293
Austin, Texas 78768

OR2001-5608

Dear Mr. Bray:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155581.

The Texas Department of Transportation (the "department") received a written request for "all documentation regarding files 01-0589 and 020624-00." You explain that 020624-00 is an investigation file that did not lead to litigation and was therefore closed, and that 01-0589 is in fact the docket number of an active contested case currently before the department that encompasses five investigation files. You assert that the requested information, in whole or in part, is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.130 of the Government Code.

We first discuss the extent to which the documents contained in file 020624-00 are excepted from public disclosure. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Accordingly, section 552.101 encompasses confidentiality provisions such as section 51.251 of the Occupations Code. The relevant footnote to that statute provides as follows:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specified occupation or profession that is provided to the licensing agency is confidential and is not subject to disclosure under the open records law.

Occ. Code § 51.251. The records at issue contain the social security number of an individual who is licensed by the department to maintain a motor vehicle dealership. Accordingly, we find that this social security number is made confidential under section 51.251 of the Occupations Code, and therefore must be withheld pursuant to section 552.101 of the Government Code.

You next seek to withhold the investigation report and attorney's notes contained in this file pursuant to section 552.111 as attorney work product.¹ See Open Records Decision No. 647 at 2-3 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749 (Tex. 1991)). Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This office has stated that if a governmental body wishes to withhold attorney work product under section 552.111, it must show that the material 1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Company v. Valdez*, 863 S.W.2d 458 (Tex. 1993), and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. See *id.*

When showing that the requested documents were created in anticipation of litigation for the first prong of the work product test, a governmental body's task is twofold. The governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue. See *id.* at 5. In this regard, you have provided the following explanation:

The investigator's reports and attorney notes . . . were prepared in anticipation of litigation or after the agency commenced an action. Pursuant to the Texas Motor Vehicle Commission Code, Tex. Rev. Civ. Ann. art 4413(36), § 3.05(a) . . . (the Code) the Motor Vehicle Board must conduct an investigation whenever the Board has reason to believe, "through receipt of a complaint or otherwise," that a violation of the Act has occurred or is likely to occur. Under § 3.01 of the Code, the Board also has authority to enforce and administer Chapter 503 of the Transportation Code.

The Enforcement Section initiates an investigation of each complaint it receives. . . . [File] 020624 was created when the Enforcement Section received a complaint concerning the Respondent. [The] complaint was referred to an investigator who prepared a report, including a recommendation, for the attorney who then determined whether or not to commence litigation based on the complaint[]. The agency investigator and regional attorney made a large number of notes and analyses of material related to the complaint. They spoke to one another, and made written notes recording those conversations. The investigator made every note and writing

¹You appear to argue work product under section 552.107. Where the litigation has concluded, the proper exception for a claim of work product is section 552.111. Open Records Decision No. 647 (1996).

for the use of the attorney who would ultimately determine whether or not to proceed with litigation in the case. The attorney gave directions or suggestions, which the investigator recorded. The attorney's notes discuss mental impressions and analyses of evidence at length.

Based on the above representations and our review of the information at issue, we conclude that you have met the first prong of the work product test. Furthermore, having reviewed the information at issue, we conclude that the information reveals attorney mental impressions, conclusions, and strategy. We therefore conclude that the department may withhold the investigator's report and the attorney notes contained in file 020624 as attorney work product under section 552.111 of the Government Code.² We have marked these documents accordingly.

Some of the documents in file 020624 also include information required to be withheld under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Accordingly, the department must withhold all Texas driver's license numbers, license plate numbers, including dealer plate numbers, and motor vehicle title and registration information pursuant to section 552.130 of the Government Code.

File 020624 also contains bank account numbers. Please note that the Seventy-seventh Legislature passed Senate Bill 694, signed by the Governor and effective May 26, 2001, which added a new section 552.136 of the Government Code.³ This newly enacted exception makes certain account numbers confidential. It provides in relevant part:

²Because we resolve this aspect of your request under the work product aspect of section 552.111, we need not address the applicability of the deliberative process privilege aspect of section 552.111, or section 552.107(1) to this information.

³The Legislature also enacted two other bills that add a section 552.136 to chapter 552. One is House Bill 2589, which makes certain e-mail addresses confidential. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The other is Senate Bill 15, which makes information maintained by family violence shelter centers confidential. *See* Act of May 14, 2001, 77th Leg., R.S., S.B. 15, § 1 (to be codified at Gov't Code § 552.136). In addition, Senate Bill 694 enacted the same language from House Bill 2589 regarding the confidentiality of e-mail addresses, but codified it as section 552.137 of the Government Code.

Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.136). We conclude that the department must withhold the bank account numbers contained in file 020624 pursuant to section 552.136 of the Government Code.

To summarize with regard to file 020624, the department must withhold the car dealer's social security number pursuant to section 552.101 of the Government Code, all Texas driver's license numbers, license plate numbers, and motor vehicle title and registration information pursuant to section 552.130 of the Government Code, and all bank account numbers pursuant to section 552.136. Furthermore, the department may withhold the investigator's report and the attorney notes pursuant to section 552.111. The remaining information contained in file 020624 must be released to the requestor.

We now address the extent to which the five investigation files encompassed by docket number 01-0589 are excepted from public disclosure. Section 552.103 of the Government Code is commonly referred to as the "litigation exception." Under section 552.103(a) and (c), the governmental body raising this exception must demonstrate that 1) litigation involving the governmental body was pending or reasonably anticipated at the time of the records request, and 2) the information at issue is related to that litigation. *See also University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

In this instance, you have demonstrated that the information at issue relates to litigation involving the department that was pending on the date of the records request. We therefore conclude that the department may withhold the information pertaining to docket number 01-0589 pursuant to section 552.103 of the Government Code, with the following exceptions.

We note that included in the submitted information are printouts from the internet. These printouts, regardless of whether they relate to the pending litigation, constitute information that is within the public domain and, as such, cannot be withheld under section 552.103. Accordingly, the department must release these printouts to the requestor.

We also note that to the extent the opposing party in the litigation has seen or had access to the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor.⁴ Open Records Decision Nos. 349 (1982), 320 (1982). The information contained in docket number 01-0589 includes information that the department either obtained from or has previously provided to the opposing party which must be released to the requestor, except to the extent the information is required to be withheld from the public pursuant to sections 552.101, 552.130, or 552.136 of the Government Code, as discussed above.⁵

To summarize with regard to the records pertaining to docket number 01-0589, the department may withhold most of these records pursuant to section 552.103 at this time. The department must release, however, the printouts from the internet and records previously provided by or to the opposing party in the litigation, except to the extent those records contain information that must be withheld from the public pursuant to sections 552.101, 552.130, or 552.136 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

⁴ In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

⁵ We additionally note that information that has been released to the opposing party may not be withheld from the public pursuant to either the attorney-client privilege or as attorney work product. *See generally* Open Records Decision No. 630 at 4 (1994).

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

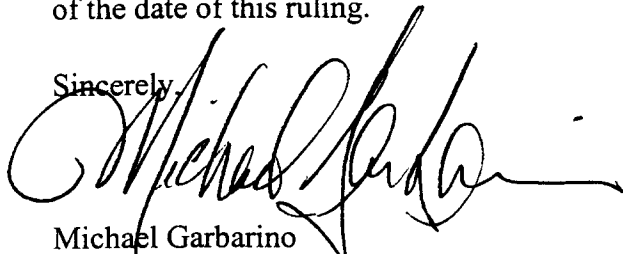
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino", with a long horizontal flourish extending to the right.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/RWP/sdk

Ref: ID# 155581

Enc: Submitted documents

c: Mr. Martin John de la Torre
802 Commerce Street, Suite 100
Houston, Texas 77002
(w/o enclosures)